COA# 48661-0; filed under wrong appellant number

No. 47868-4-II

#14-1-00293-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BYRON FAMOUS JACKSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
LEWIS COUNTY

The Honorable Richard Brosey, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Resentencing is required because five prior burglary convictions from California were counted in the offender score even though the California crime is not legally comparable to a Washington felony and factual comparability has not been and cannot constitutionally be proved under Mathis v. United States, __ U.S. __, 136 S. Ct. 2243, 195 L. Ed.2d 604 (2016).

2. Appellant Byron Jackson was deprived of his Sixth Amendment and Article 1, § 22 rights to effective assistance of appointed counsel.

3. The lower court erred in failing to follow the mandates of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), as made clear by City of Richland v. Wakefield, __ Wn.2d __, 380 P.3d 459 (2016), and further did not comply with the requirements of RCW 10.01.160 in ordering discretionary Did the court below err in counting prior California burglary convictions in the offender score where there was factual comparability was neither proven nor properly waived?

3. Two of the California burglaries were alleged to have occurred on the same day. The court counted the crimes separately in determining the offender score, based upon the assumption that the two convictions must have been for separate locations, as Washington law provides.

   At the relevant time, California allowed conviction for multiple counts of burglary based upon going into different areas of the same building, unlike in our state. Were those burglaries improperly counted separately towards the offender score?

4. Were initial and subsequent appointed counsel prejudicially ineffective by failing to conduct minimal reasonable investigation into the law and matters of defense applicable to their clients' case?

5. At the original sentencing, the trial court did not follow the mandates of RCW 10.01.160 and failed to consider appellant's actual ability to pay prior to imposing legal financial obligations and terms. Did the trial court err in failing to apply State v. Blazina, supra, and its progeny and in failing to properly consider Jackson's actual ability to pay in detail before imposing legal financial obligations?

6. To the extent that Sinclair might be seen to create an additional briefing requirement which amounts to a presumption of imposition of costs on appeal against an indigent person who has exercised his constitutional right to appeal, does Sinclair run afoul of Nolan and the constitutional requirements of Fuller as set forth in Blank?

7. Although Division One held in Sinclair that Blazina did not apply because it did not interpret the appellate costs statute, should this Court exercise its considerable discretion to deny costs on appeal in the event the decision this Court ultimately issues is favorable enough to the prosecution that the state may have a claim it is the "substantially prevailing party" on review?

8. Should this Court decline to impose costs on appeal against appellant who was found indigent for trial and appeal where there has been no evidence presented of any change in his financial situation and he was ordered to spend years in prison ?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Byron F. Jackson was charged by and entered an Alford[1] /no contest plea on July 18, 2014, to a Second Amended Information filed in Lewis County superior court, charging count 1 - residential burglary (RCW 9A.52.025(1)); count II - second-degree assault (RCW 9A.36.021(1)(c)); count III - second-degree assault (RCW 9A.36.021(1)(c)); and count IV - unlawful imprisonment (RCW 9A.40.010(1) and RCW 9A.40.040). CP 25-36; 5RP 1.[2] The plea hearing

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] The 8 volumes of verbatim report of proceedings will be referred to as follows:
May 19, 2014, arraignment before Judge Richard Brosey, as "1RP;"
June 19, 2014, omnibus before Judge Nelson Hunt, as "2RP;"
July 10, 2014, motion to dismiss attorney before Judge Hunt, as "3RP;"
July 17, 2014, as "4RP;"
July 18, 2014, plea and sentencing before Judge Brosey, as "5RP;"
July 24, 2014, entry of sentence before Judge Brosey, as "6RP;"
the chronologically paginated volume containing the proceedings of

was held before the Honorable Richard L. Brosey on July 18, 2014. 5RP 1. Sentencing began that day and was completed with "formal entry" on July 24, 2014. See 5RP; 6RP.

In July of 2015, Mr. Jackson filed several motions asking for relief from the judgment and sentence. See CP 57-81. After hearings on August 27 and November 24 and 25, 2015, and January 15 and 16, 2016, Judge Brosey granted the motions in part and denied in part. 7RP 106-107. Jackson filed a notice of appeal and this pleading follows. See CP 319-22.

2. Relevant facts

It was alleged that appellant Byron Jackson went to an address in Centralia and threatened to kill a man and women inside the home with a baseball bat. CP 7-8. An officer who arrived heard screaming and saw Jackson holding a brown wood bat in his right hand. CP 7-8. According to one of the alleged victims, Jackson had come by looking for his girlfriend and said he would kill the man at the house if Jackson's girlfriend was not present when Jackson next returned. CP 8. Jackson returned later with another and was accused of kicking down the door and making threats with the bat before he was ultimately arrested. CP 8-10.

Jackson and the man he was with when arrested both said they went to the home looking for Jackson's girlfriend because she was using methamphetamine again. CP 10. They were very worried about her and trying to find her for her own safety. CP 10. Jackson explained he had

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August 27 and November 24, 2015 and January 15 and 16, 2016, as "7RP;" and
November 25, 2015, as "8RP."

been trying to scare the folks in the house into telling him where to find her because of his concerns. CP 10.

Facts relating to the issues are discussed in more detail in the argument section, *infra*.

D. ARGUMENT

1. THE COURT SHOULD REMAND FOR RESENTENCING WITH A CORRECTED OFFENDER SCORE AND NEW APPOINTED COUNSEL

Under the Sentencing Reform Act (SRA), a defendant is sentenced based upon a combination of his "offender score" and the statutory "seriousness level" of the current offense. See RCW 9.94A.530(1); State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). An "offender score" is calculated based on the defendant's current and prior convictions, using formulas set forth in the sentencing statutes to determine what "score" to apply. See RCW 9.94A.525; State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). Because the seriousness level and offender scores "have enormous influence over the actual time a defendant serves in prison," sentencing courts are regularly tasked with expending "much effort deciding between rival calculations" of the two scores. Wiley, 124 Wn.2d at 679.

Where it is alleged that the defendant has out-of-state convictions, a sentencing court may only include such convictions in the offender score if the court first determines that the out-of-state conviction is "comparable" to a Washington crime. See RCW 9.94A.525(3). Put another way, "[o]nly if the convictions are comparable can the out-of-state conviction be included in the offender score." State v. Arndt, 179 Wn.

App. 373, 320 P.3d 104 (2014).

In this case, Jackson was improperly sentenced based on an offender score calculated by inclusion of a number of out-of-state convictions even though those convictions were not proven comparable as required. Further, because of counsels' failures below, Jackson was deprived of his rights to effective assistance. New counsel should therefore be appointed on remand.

a. Relevant facts

Jackson was sentenced initially based on an offender score of 9+ for each offense. CP 41. That calculation was listed in the judgment and sentence as follows:

Current Crime	Seriousness	Score	Range
Residential Burglary	IV	9+	63-84 months
Assault 2	IV	9+	63-84 months
Assault 2	IV	9+	63-84 months
Unlawful Imprisonment	III	9+	51-60 months

CP 41-42.

Jackson entered Alford pleas to the charges in the second-amended information, maintaining his innocence but taking advantage of the state's plea offer after balancing the risks/benefits. CP 35-36; 5RP 2. The prior convictions for Jackson were listed on the judgment and sentence and offender score stipulation as follows:

Crime	Date of crime	Sentencing	Court
Residential Burglary	02/03/97	03/17/97	San Diego, CA
Residential Burglary		06/24/96	San Diego, CA
Residential Burglary		06/24/96	San Diego, CA
Residential Burglary		06/24/96	San Diego, CA
Residential Burglary		06/24/96	San Diego, CA
Theft of a Firearm		06/24/96	San Diego, CA
Theft of a Firearm		06/24/96	San Diego, CA

CP 37-38, 41. At the plea hearing, both counsel indicated that "no matter how it shakes out, given what he's pleading to today, he will have a score of at least 9 to all of the counts[.]" 5RP 2. Appointed counsel Blair agreed that, as a young man, Jackson had "a number of burglary convictions out of California." 5RP 3. Blair said they were "multipliers" which increased the offender score for the current crime. 5RP 3.

The court confirmed that the prosecution was still "in the process of verifying" the criminal history for Jackson from California even at the time of the plea and sentence hearing. 5RP 11-12. The expectation, however, was that the minimum offender score of 9 led to the current standard range. 5RP 11-12. The court imposed 70 months on the first three counts and 60 on the fourth, all running concurrent. 5RP 27.

In July of 2015, Mr. Jackson filed, *inter alia*, a motion to modify the judgment and sentence. CP 57-58. In that motion, he argued that the sentence was improperly calculated because the prior California convictions "were miscalculated by misapplication of Law[.]" See CP 57-58. Jackson also argued that the original sentencing court had erred in counting the prior California crimes because they should have been treated as a "crime spree" or "same criminal conduct." CP 61-62.

In response, the prosecution admitted Jackson had not waived the right to challenge a miscalculated offender score but argued that Jackson had waived "same criminal conduct" questions because those were "factual." CP 147-49, 154. The prosecution also claimed that, because Jackson had not made a "comparison analysis" for the out-of-state convictions at sentencing, he had waived that as a "factual issue" as well.

CP 154. In the alternative, the prosecutor submitted exhibits regarding the prior California convictions which the prosecution argued showed the prior crimes were not the "same criminal conduct." See CP 154.

The judge appointed new counsel for the motions hearing. 7RP 6-7; CP 303. Such appointment was needed because Mr. Jackson's arguments included a claim that prior counsel Blair had been ineffective. 7RP 6-7; CP 303.

On January 15, 2016, new counsel, Mr. Clark, withdrew some of Jackson's pro se arguments (such as the motion to withdraw the plea). 7RP 10-11. Clark then argued, *inter alia*, that the offender score was wrongly calculated and prior counsel Blair ineffective, because the California convictions were not all properly proven and some of them could have been "same criminal conduct" and counted as one. 7RP 10-11.

Mr. Jackson testified that counsel Blair had asked about Jackson's criminal history and Jackson had told his attorney that he had some prior burglary convictions but did not know "the specifics." 7RP 17. Blair did not actually show his client anything like a list of alleged priors. 7RP 17-18. Nor did Blair show Jackson the paperwork including the stipulation on priors until they were in court for the plea. 7RP 18-22. At that time, Blair just said to sign it but did not go over it with his client. 7RP 18-22.

When he testified at the CrR 7.8 hearing, Blair admitted that, at the time of sentencing, he had probably just handed Jackson the stipulation on the offender score to sign in court. 7RP 62. The attorney also conceded he likely only "briefly" went over the judgment and sentence with Jackson. 7RP 62.

Jackson said he had questioned the offender score but Blair had dismissed his client's concerns. 7RP 18-19. Jackson thought the score should be lower because of the doctrine of "same criminal conduct," but Blair told Jackson that was not how the law worked. 7RP 18-19.

Blair was clear at the hearing that he believed his client would have made a grave mistake if he had gone to trial, because of the risk of conviction, severity of the charges and potential sentence as originally charged. 7RP 49, 51. The attorney conceded that he had argued with his client about how the California burglaries should be counted. 7RP 46-52. Blair talked with Jackson a little about his criminal history and thought his client had said some of the crimes had occurred on the same day with different victims but others were on different days. 7RP 47. Based on those discussions, Blair had no further questions about how to calculate the offender score and did not investigate further. 7RP 49, 66, 75-7c6.

Paperwork regarding Jackson's criminal history was not in the initial discovery. 7RP 65. Because Blair received the "NCIC" printout and California documents later, he admitted, all communication he had with Jackson about criminal history was through the glass wall in the jail interview room. 7RP 65. Blair thought he might have held up the California documents to the interview room window to show them to Jackson at some point, but conceded that he never gave anything to Jackson which listed Jackson's criminal history. 7RP 66, 80. The attorney admitted that he could have "[a]bsolutely" gotten the relevant documents to Jackson but dismissed questions about why that did not occur by saying his client "didn't ask." 7RP 66-67.

When new counsel Clark pointed out that the judgment and sentence lacked details about the California prior crimes, such as relevant dates, Blair was unconcerned. 7RP 67-68. He explained, "there was never a question between Mr. Jackson and myself that he had been convicted of all of these crimes." 7RP 67-68. Because of his confidence that the prior convictions existed, Blair did not think those other details were "a question" he might need to examine on his client's behalf. 7RP 68.

At one point during his cross-examination of Blair, Clark asked former counsel if he had ever investigated "whether or not the burglaries from California were comparable to burglaries" in Washington. 7RP 58-59. Prior counsel declared:

> I actually did. And routinely, routinely I do that with out-of state convictions. And I know Oregon has a burglary statute that is different than Washington, but California's is almost the same as Washington state's.

7RP 58-59.

After the testimony, counsel Clark argued that Jackson should be resentenced by counting the California burglaries differently. First, he argued that the June 1996 "four residential burglaries and two grant theft of a firearms" should count as one point even though they were not all on the same day. 7RP 92. Clark argued that the information provided by the state about the California crimes did not include addresses or "different victim names regarding the residences[.]" 7RP 92. He urged the court not to rely on Blair's apparent recollection that Jackson had mentioned different places as sufficient to prove that the crimes should not be counted as one for sentencing purposes. 7RP 93.

In the alternative, Clark asked the court to group the different California crimes by day and, instead of counting them as six separate crimes, count them as three based on a theory of "continuing course of conduct." 7RP 93. But Clark said the California burglaries might mean each day would be counted as "potentially one point or two" because with a residential burglary prior "the multiplier would kick in[.]" 7RP 94.

Clark continued to press the idea that, for the California burglaries both charged for a date of May 28, 1996, "[w]e don't have different addresses" or "time frames." 7RP 94. Clark went on:

> We don't know if that was, you know, a scenario where the person walked in, oh, forgot, ran back in the house got a second load of items all within, you know, a couple minutes. We don't know if it was a second house. And the only facts that we have is just that it says in the charging document this residential burglary occurred on this day.

7RP 94.

Clark concluded that, if the court counted all the May 1996 California convictions as one, the resulting offender score would lead to a standard range of 43-57 months. 7RP 94-96. If counted by day as three, the offender score would be 8 and a lower standard range, of 53-70, would apply. 7RP 94-96.

Clark also argued that Blair had been ineffective "because the California stuff wasn't properly vetted." 7RP 97-98. He noted that Blair had spent a total of 21 or so hours on the case and that the judgment and sentence and the stipulation to the prior convictions did not list the dates of the crimes. 7RP 98. Clark pointed out that, with the evidence the state had now provided, it was not clear that there were separate residences and

what California law was regarding same criminal conduct in 1996 "or [if] his attorney looked into it at all." 7RP 99.

In ruling, the judge stated his belief that former counsel Blair had been effective. 7RP 100. The judge thought that Jackson discussing the idea of "crime spree" implied "different crimes," which would have counted separately, so Blair had probably relied on that "message" in conversations with his client. 7RP 100. The judge also relied on his experience with Blair in other cases, stating Blair was usually "very thorough." 7RP 104.

The court was also unaware of any "crime spree" rule and thought that there was no "same, similar conduct" issue because, based on the documents the state had presented. 7RP 100-101. The court concluded that there was "no basis" as a matter of law presented to support counting the California priors from 1996 differently than "multiples as was done." 7RP 101. The court also pointed out that the defendant had signed a stipulation on his priors. 7RP 101.

The court was particularly convinced by former counsel Blair's claim that he had conducted the required legal investigation of the sentence on his client's behalf. 7RP 105. The judge stated Blair's claim that he had done "at least a comparability analysis" for the California crimes was "not refuted." 7RP 105. As a result, the judge said, "it's not like nobody took a look at these and said, well, is this statute really the same crime that was committed here as far as the priors are concerned?" 7RP 105.

The judge concluded that Jackson's criminal history "was properly

represented and presented to the Court at the time that we did the sentencing, determined the standard range, and that sentence was pronounced accordingly." 7RP 107. Written findings and conclusions were entered on January 21, 2016. CP 316. Included were findings that the "same criminal conduct and comparative analysis" were waived and that Mr. Jackson had failed to present evidence to support his claim, and that the court did not agree that the California convictions "were one offense for sentencing purposes." CP 316.

b. The California priors were not proven legally comparable or factually comparable and counsel were prejudicially ineffective

This Court should reverse and remand for resentencing, because the prior convictions were not proven to be legally or factually comparable as required. Further, new counsel should be appointed on remand, because both appointed counsel below were prejudicially ineffective.

Under RCW 9.94A.525(3), "out-of-state convictions for offenses shall be classified according to comparable definitions and sentences provided by Washington law[.]" It is the prosecution's burden to prove that an out-of-state conviction should be counted. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999), quoting, In re Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). Further, that obligation exists regardless whether the defense objects or gives "notice" that the state will have to prove comparability. State v. McCorkle, 137 Wn.2d 490, 496, 973P.2d 461 (1999).

Put simply, "[u]nder the SRA, the State's burden is mandatory." McCorkle, 137 Wn.2d at 496. Due process also requires the state to

shoulder the burden of proof by sufficient reliable evidence. See State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009). The issue of an illegal or erroneous sentence may be raised for the first time on appeal. See Ross, 152 Wn.2d at 229.

Here, the issue is whether the court properly included the California convictions in the offender score calculation. Before the convictions could be included, the court had to find them either legally or factually comparable to a Washington state offense. See State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

"Comparability" is determined using a two-step test. Id. First, the court examines whether the out-of-state conviction is for an offense which is "legally comparable" to a similar Washington offense. State v. Olsen, 180 Wn.2d 468, 472-73, 325 P.3d 187 (2014). If the offenses are legally comparable, they count in the offender score. Id. If, however, the out-of-state conviction is for a crime which is more broadly defined than the relevant Washington crime, the court cannot include the offense in the offender score unless there is proof the prior offense is "factually comparable" to a Washington offense. Id. Further, factual comparability analysis is limited by constitutional constraints surrounding the rights to trial by jury and proof beyond a reasonable doubt. In re the Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

The prior convictions in this case are listed as follows:

Crime	Date of crime	Sentencing	Court
Residential Burglary	02/03/97	03/17/97	San Diego, CA
Residential Burglary		06/24/96	San Diego, CA
Residential Burglary		06/24/96	San Diego, CA

Residential Burglary	06/24/96	San Diego, CA
Residential Burglary	06/24/96	San Diego, CA
Theft of a Firearm	06/24/96	San Diego, CA
Theft of a Firearm	06/24/96	San Diego, CA

CP 37-38, 41.

The errors in this case all involve the prior burglary counts. More than 15 years ago, the U.S. Supreme Court noted that burglary statutes vary widely from state to state. See Taylor v. U.S., 495 U.S. 575, 580, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). And more than 10 years ago, a court in this state recognized that the California burglary statute is more broad than our own. See State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006).

In our state, RCW 9A.52.030(1) provides that a person is guilty of second-degree burglary "if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.025(1) defines "residential burglary" as occurring when, "with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." Both crimes require as an essential element that the entry or remaining was "unlawful." RCW 9A.52.030(1); RCW 9A.52.025(1); see State v. Miller, 90 Wn. App. 720, 724, 954 P.2d 925 (1998).

Thus, in Washington, one is not guilty of burglary unless there is proof of an unlawful entry or unlawful remaining. See Thomas, 135 Wn. App. at 483; see also, State v. Lawson, 185 Wn. App. 349, 340 P.3d 979 (2014).

The relevant California statute for the prior convictions is Cal. Penal Code § 459. It is under this provision the 1997 and 1996 California burglaries were charged. See CP 201-209. § 459 provides that "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store. . .with intent to commit grand or petit larceny or any felony is guilty of burglary." California's crime of burglary does not require that the entry or remaining must be unlawful. See Thomas, 135 Wn. App. at 483.

Instead, in California, a person may be found guilty of burglary even if he entered or remained in the building, dwelling or space *lawfully*. Cal. Penal Code § 459; see, In re M.A., 209 Cal App. 4th 317, 319, 146 Cal. Rptr. 818 (2012) (first-degree burglary with permission to enter and entry without intent to steal but formation of intent and entry into separate closet inside house).

As a result, the California crime of burglary under § 459 is not legally comparable to a similar Washington crime. Thomas, 135 Wn. App. at 483. As the Thomas Court noted, California's crime covers conduct which would not be a violation of the similar Washington laws and is thus more broad. 135 Wn. App. at 483. In fact, the unusual breadth of the California statute is such that it makes shoplifting a burglary, as the U.S. Supreme Court has recently noted. See Descamps v. United States, 570 U.S. __, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

Because the California burglary statute is broader than the statutes defining the relevant Washington crimes, the five prior California burglary convictions were not legally comparable to Washington crimes and could

not be counted in the offender score unless they were proven "factually comparable." See Olsen, 180 Wn.2d at 474.

In ruling to the contrary below, the trial court was particularly convinced by former counsel Blair's testimony that he had conducted the required legal investigation of the sentence on his client's behalf. 7RP 105. The judge relied on Blair's claim that the attorney had done "at least a comparability analysis" for the California crimes - a claim the court noted was "not refuted." 7RP 105. As a result, the judge was convinced, "it's not like nobody took a look at these and said, well, is this statute really the same crime that was committed here as far as the priors are concerned?" 7RP 105.

This reliance is not surprising. At the CrR 7.8 hearing, when asked if he had conducted the legal comparability analysis and looked at the relevant statutes, Blair declared:

> I actually did. And routinely, routinely I do that with out-of state convictions. And I know Oregon has a burglary statute that is different than Washington, but California's is almost the same as Washington state's.

7RP 58-59.

Even a cursory look at the law casts serious doubt on that claim. accurate. Thomas was decided well before sentencing here. See Thomas, 135 Wn. App. at 483. Before the CrR 7.8 hearing, the U.S. Supreme Court had also noted the extremely broad scope of California's burglary law. See Descamps, supra.. Had counsel examined the law as he suggests, it is hard to imagine he would have failed to note the very broad scope of the California law.

Both the Sixth Amendment and Article 1, § 22, protect the right to effective assistance of counsel at all critical stages of a criminal proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Although there is a strong presumption of effectiveness, counsel is not constitutionally sufficient if his performance falls below an objective standard of reasonableness and prejudiced his client. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

The importance of the California crimes to Mr. Jackson's case was absolutely clear - and not just in hindsight. Blair told his client that those prior burglaries in California were "multipliers." 7RP 52. And Blair thought they would count as two points each against any current burglary charge. 7RP 52. Thus, the proper counting of the California burglaries was clearly a crucial part of counsel's duties for his client.

Yet Blair clearly did not check the relevant law. And he admitted below that, once he spoke with his client about the issue of whether "same criminal conduct" applied to the California burglaries, Blair did not believe he needed to look into it further. 7RP 67-69. And when asked why he had not held the state to its burden of proof regarding the California convictions, Blair responded, "I don't make the state do anything, other than if I go to trial, I make them prove their case." 7RP 67.

Failure to prepare adequately to represent your client is ineffective

assistance. State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015). Counsel must, at a minimum, make adequate investigation into the matters of defense which may be raised on his client's behalf. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

The lower court erred in finding that prior counsel Blair had provided effective assistance of appointed counsel. Blair clearly failed to conduct the required minimal investigation into matters of defense for his client - if he had, he would have turned up Thomas and discovered that legal comparability did not exist. Further, Blair's misrepresentation to the court about the statutes misled the court into believing that Blair had done that which he did not do - investigated the relevant laws on his client's behalf.

Unfortunately for Mr. Jackson, the second counsel appointed to represent him performed not much better than the first. Again, appointed counsel apparently failed to take a minimal amount of time to research the relevant law which would have shown him that the prior California burglaries were *not* legally comparable. That failure kept him from being able to cross-examine Blair effectively about Blair's claims that he had examined the relevant statutes. Further, that failure is obvious because *new* appointed counsel *also* failed to find Thomas or any of the relevant statutes or law establishing that California's burglary statute is more broad. And he made no argument on this issue below.

Counsel Clark's ineffectiveness was further demonstrated - and error further proved - by the fact that the California burglaries could not be included in the offender score as "factually comparable" - yet they were.

With "factual" comparability, a Washington court tries to determine whether the defendant's conduct underlying the out-of-state crime would violate a comparable Washington state statute. Thiefault, 160 Wn.2d at 419. There are, however, constitutional limits which apply. Id.; see Olsen, 180 Wn.2d at 477-78. Because of the state and federal rights to proof beyond a reasonable doubt and trial by jury of any facts relied on to increase a sentence, a court may only consider facts admitted, stipulated to, or proved beyond a reasonable doubt when examining "factual comparability." Thiefault,160 Wn.2d at 415.

The issue of such comparability is not easily dismissed simply because there is some indication in the prior case record of the relevant facts. The "elements of the charged crime must remain the cornerstone of this inquiry," the Supreme Court has cautioned. Id. This is because other facts and allegations contained in the record - "if not directly related to the elements of the charged crime" - may not have been sufficiently proven beyond a reasonable doubt. Id. Indeed, there may not have been a reason for the defendant to challenge facts not related to the elements or conviction even if not correct. Id.

The Sixth Amendment implications of having a judge make factual findings about the nature of a prior conviction has been the subject of much litigation in recent years, starting in earnest with Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In Olsen, supra, the Washington Supreme Court held upheld our state's "comparability" analysis against challenges that the "factual" portion of the two-step inquiry now violated the state and federal constitutional rights

to trial by jury and proof beyond a reasonable doubt under recent caselaw. More specifically, the Olsen Court rejected the idea that our state's analysis was in any way affected by the Supreme Court's decision in Descamps, supra. Olsen, 180 Wn.2d at 477-78. Descamps held that it would violate the Sixth Amendment to allow a judge to make a factual finding to determine whether a defendant had committed a crime equivalent to the local crime where the statute defining the foreign crime was broader than the generic offense. The Olsen Court distinguished that situation from our system, which the Court found "limits our consideration of facts that might have supported a prior conviction to only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant." Olsen, 180 Wn.2d at 477-78.

More recently, in 2016, the U.S. Supreme Court issued Mathis v. U.S., __ U.S. __, 136 S. Ct. 2243, 195 L. Ed.2d 604 (2016). In Mathis, the Supreme Court looked again at the "categorical approach" and its rule that a prior crime will qualify to enhance a sentence under the federal Armed Career Criminal Act (ACCA) only if the elements of that crime are the same as or narrower than those of a "generic" version of the offense ("i.e., the offense as commonly understood"). 136 S. Ct. at 2248. The Court noted first that the "categorical approach" - like our state's "legal comparability" approach - compares solely the elements of the relevant crimes, "while ignoring the particular facts of the case." Id.

The Court next moved to more complex statutes ("divisible"), which may list elements in the alternative so as to create multiple crimes,

such as if the same statute prohibited lawful *or* unlawful entry with intent to steal. Id. Under those situations, the Court noted, the sentencing court is required to figure out which elements were "integral" to the conviction, and uses the "modified categorical approach." The Court described that approach as looking at a "limited class of documents" to determine "what crime, with what elements, a defendant was convicted of." Id. This type of fact-finding was permissible.

The Court then discussed a different kind of "alternatively phrased law," which "enumerates various factual means of committing a single element." 136 S. Ct. at 2249. As an example, the Court cited a statute which required proof of use of a "deadly weapon" as an element of the crime but then included as deadly weapon definitions "knife, gun, bat or similar weapons." Under such situations, the Court said, the list simply "specifies diverse means of satisfying a single element of a single crime," so that the jury need not agree on which deadly weapon was used. Id. Another example was for Iowa's burglary law, which makes it a crime to unlawfully enter "any building, structure [or] land, water, or air vehicle." Id. That was in contrast to the ACCA generic offense, which makes it unlawful to enter only a "building or other structure." Id.

The District Court inspected the records of Mathis' prior convictions and determined that they proved that Mathis had burglarized structures, not vehicles. 136 S. Ct. at 2251. The theory was that the court should inspect the records of the prior conviction to determine if the defendant had committed it in a way that met the definition of generic burglary and thus it should be counted towards an ACCA sentence.

But the Mathis Court was concerned about allowing a trial court to go beyond an "elements-only" inquiry in deciding whether to count a prior conviction to enhance a sentence under the ACCA. It was not just the language of the statute in question but also "serious Sixth Amendment concerns." The Court noted that "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed" the offense, and he is "barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea" or what a jury in a prior trial "must have accepted as the theory of the crime." Id., quoting, Descamps, 570 U.S. at __, 133 S. Ct. at 2288.

In addition, the Court noted that an elements-only focus "avoids unfairness to defendants." Id. The Court was aware that statements of "non-elemental fact" in records of prior conviction are unlikely to be challenged when their proof is "unnecessary." 133 S. Ct. at 2252-53. The Court noted that a defendant has no incentive to contest "what does not matter under the law," so that a prosecutor's or judge's mistake reflected in the record is "likely to go uncorrected." Id. The Court concluded, "[s]uch inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." Id.

In Mathis, the U.S. Supreme Court was concerned with the "possible unfairness of basing an increasing penalty on something not legally necessary to a prior conviction." Id. Put another way, the Court said, whatever a criminal statute "says, or leaves out, about diverse ways of committing a crime makes no difference to the defendant's incentives

(or lack thereof) to contest such matters." Id.

The Court then concluded that it was not constitutional to apply a "modified categorical approach" to determine the means by which Mathis committed his prior crimes and thus whether they would qualify. The Court went on:

> In other words, the modified approach serves - and serves solely - as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque. **It is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that could also have satisfied the elements of a generic offense.**

136 W. Ct. at 2253-54 (emphasis added).

The Mathis Court rejected the idea that a "non-elemental" fact could be assumed to have been proven or found sufficiently during prior proceedings. Id. And the Court said it had "made clear that a court may not look behind the elements of a generally drafted statute to identify the means by which a defendant committed the crime." Id.

The Mathis case thus establishes that it is improper for a trial court to examine documents and assume that a "non-elemental" fact has been proven or found. Id.

In Olsen, supra, our state's highest Court noted that, where a prior conviction is not legally comparable, such a crime is essentially a separate crime and Apprendi applied. Olsen, 180 Wn.2d at 473. As a result, where the state is only trying to prove the *existence* of a prior conviction, that may be proven to a judge by a preponderance. See Thiefault, 160 Wn.2d at 419. But where the court "must look to the facts underlying a foreign

offense to determine its comparability," the court may only consider facts admitted, stipulated to or proven beyond a reasonable doubt. Lavery, 154 Wn.2d at 258; Olsen, 180 Wn.2d at 473.

Further, the Supreme Court of our state has already recognized that even a "stipulation" for the purposes of factual comparability must be carefully constrained. See Ross, 152 Wn.2d at 230. In Ross, the Court found that a "stipulation" for these purposes does not occur based on failure to object, and in fact does not occur unless and until the defendant makes an "affirmative acknowledgment" of comparability. Ross, 152 Wn.2d at 230; see Ford, 137 Wn.2d at 483 n. 5.

Under Mathis, however, there is now a further limit. Now a court must ask not only whether the relevant facts were admitted, stipulated to or proven beyond a reasonable doubt but further, it must ask whether those facts were elemental - i.e., essential to the proof of the prior crime. __ U.S. at __, 133 S. Ct. at 2288. The sentencing court is barred from making a disputed determination about "'what the defendant and state judge must have understood as the factual basis of the prior plea" or what a jury in a prior trial "must have accepted as the theory of the crime," unless the facts in question are essential elements of the prior crime. Id., quoting, Descamps, 570 U.S. at __, 133 S. Ct. at 2288. As the Mathis Court found, there is "possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction," because of the question of "the defendant's incentives (or lack thereof) to contest such matters." Mathis, __ U.S. at __; 133 S. Ct. at 2253.

In this case, that analysis is fatal to the prosecution's reliance on

the five prior California burglaries. For the 1997 "residential burglary" the prosecutor presented: a felony complaint alleging "residential burglary" for a violation of penal code section 459, with an allegation it was of an "inhabited dwelling house" under penal code section 460, and a plea agreement saying he admitted to having "unlawfully went into a residence with the intent to steal." CP 201-209.

But the California crime of residential burglary does not require proof of unlawful entry. See People v. Birks, 19 Cal. 4th 108, 118 n. 8, 960 P.2d 1073, 77 Cal. Rptr.2d 849 (1998). Entry with the required intent will amount to burglary even if that entry was permitted. See id; see also, People v. Epps, 34 Cal. App. 3d 146, 163 Cal. App.2d 93, 102-103, 57 Cal. Rptr. 441 (1967). Thus, the "fact" that the plea paperwork refers to the entry as "unlawful" does not support a factual finding of comparability under Mathis.

This is even more true for the 1996 prior burglary convictions. For those offenses, the prosecutor provided the complaint for the 1996 case. CP 214-16 . That complaint alleged the crimes as follows:

> On or about May 24, 1996, BYRON FAMOS [SP] JACKSON did willfully and unlawfully enter a building with the intent to commit theft, in violation of PENAL CODE SECTION 459.
>
> And, it is further alleged that said burglary was a burglary of an inhabited dwelling house, trailer coach, inhabited portion of a building, within the meaning of Penal Code section 460.
>
> And, it is further alleged that the defendant is ineligible for probation pursuant to section 462(a) of the Penal Code.
>
> COUNT 2 - RESIDENTIAL BURGLARY
>
> On or about May 28, 1996, BYRON FAMOS [SP]

JACKSON did willfully and unlawfully enter a building with the intent to commit theft, in violation of PENAL CODE SECTION 459.

And, it is further alleged that said burglary was a burglary of an inhabited dwelling house, trailer coach, inhabited portion of a building, within the meaning of Penal Code section 460.

And, it is further alleged that the defendant is ineligible for probation pursuant to section 462(a) of the Penal Code.

COUNT 3 - RESIDENTIAL BURGLARY

On or about May 28, 1996, BYRON FAMOS [SP] JACKSON did willfully and unlawfully enter a building with the intent to commit theft, in violation of PENAL CODE SECTION 459.

And, it is further alleged that said burglary was a burglary of an inhabited dwelling house, trailer coach, inhabited portion of a building, within the meaning of Penal Code section 460.

And, it is further alleged that the defendant is ineligible for probation pursuant to section 462(a) of the Penal Code.

COUNT 4 - RESIDENTIAL BURGLARY

On or about May 29, 1996, BYRON FAMOS [SP] JACKSON did willfully and unlawfully enter a building with the intent to commit theft, in violation of PENAL CODE SECTION 459.

And, it is further alleged that said burglary was a burglary of an inhabited dwelling house, trailer coach, inhabited portion of a building, within the meaning of Penal Code section 460.

And, it is further alleged that the defendant is ineligible for probation pursuant to section 462(a) of the Penal Code.

CP 214-16. But the plea agreement did not agree that Jackson was agreeing that he entered or remained "unlawfully," only that he was pleading to " Ct. 1 PC 459/Ct. 2 PC 459/Ct. 3 PC 459/Ct. 4 PC 459." . Another document referring to the 1996 counts in 1997 apparently for the purposes of probation review refers only to "VIOLATION OF PC 459

CTS 1,2, 3, 4" in relation to the burglaries. CP 230-31. A further document indicating a "Remittitur Resentence" also refers only to "PC 459 Ct 1,2,3, 4" for those counts. CP 234. A 1998 "abstract" shows those crimes as "Burglary 1st deg.," not "residential burglary," and again refers only to PC 459. CP 239-40.

Thus, for the 1996 crimes, it is only the charging document which includes a declaration that there was unlawful entry, but no evidence the plea included a stipulation or agreement as to that extraneous fact. Further, again, because the California crime did not require unlawful entry or unlawful remaining as an essential element, under Mathis and Ross it is problematic to assume that the entry of the pleas to the four 1996 offenses involved a knowing stipulation to a fact which is not an element.

Once again, second appointed counsel was ineffective. Had he conducted a minimal investigation of the relevant law on his client's behalf, he would first have learned that the five prior burglaries were not "legally comparable" to a Washington offense. He could have fully impeached the mistaken belief that prior counsel had acted with minimal competence. He could have cited the *published caselaw* in his client's support.

But next, he would have realized that the documentation presented by the state was further insufficient to support a finding of "factual comparability" for either the 1997 conviction (under Mathis and Scott) or the four 1996 convictions. He could easily have challenged as unknowing the boilerplate "stipulation" as signed in passing without effective assistance, because he could have shown that counsel Blair had not

investigated the comparability issues prior to having his client sign that document in court without discussing it.

Yet Clark, who was appointed to investigate whether prior counsel had properly determined that the five prior California burglaries should be counted in the offender score, *failed in the same way himself.*

There is a second serious problem with the decision of the court - and counsels' performance - below. Two of the prior convictions for burglary in California were for the same day, but there was nothing which showed they were for different places or involved different victims. To his credit, counsel Clark noted this serious hole in the evidence below. 7RP 69-70. Indeed, he pointed it out, questioning Blair whether the two offenses could have counted as one. 7RP 69. Former counsel Blair then chided, "how could it be the same residence for two counts," and opined that he did not think his client had said anything about "burglarizing the same house twice." 7RP 69.

Again, Blair's testimony shows that he failed to conduct minimal investigation into the relevant matters of defense on Mr. Jackson's behalf. Until recently, in fact, California *allowed* two burglary convictions for entries into different rooms in the same building - so it *could have* been two convictions for one home. See, People v. Garcia, 62 Cal. 4th 1116, 1123 (2016) (§459 "allows for multiple burglary convictions within the same structure in at least some cases"). Indeed, it was only a few months ago in Garcia that California's highest Court retreated from that holding. Id. In Garcia, the Court noted its previous caselaw but decided to adopt a new requirement, holding that "the simple fact that a defendant has

committed two entries with felonious intent into a structure and a room within that structure does not permit multiple burglary convictions" unless it is now shown that there was some difference in nature between the separate room and general structure. 62 Cal. 4th at 1119-20.

Again, Jackson was deprived of his constitutionally protected rights to effective assistance of counsel at the CrR 7.8 hearing. If the importance of the California convictions was not already clear when Blair was thinking they were "multipliers" which counted as two points each, it should have been patently obvious to Clark. Clark was, after all, appointed to replace Blair because Blair was alleged to have been constitutionally ineffective - in particular, for the "counting" of the California burglaries. See e.g. 7RP 52. Clark faulted Blair for failing to make the state meet its burden of proof regarding the California convictions but himself clearly failed to conduct minimal investigation into the relevant law.

Failure to prepare adequately to represent your client is ineffective assistance. Jury, 19 Wn. App. at 263. Counsel does not meet even the forgiving standard of minimal adequacy when he does not make sufficient investigation into the matters of defense which may be raised on his client's behalf. Id. And the Court does not defer to counsel or apply a presumption of strategic effectiveness unless it is clear that counsel made an "*informed* and reasonable decision" regarding investigation. Jones, 183 Wn.2d at 340 (emphasis in original). It is neither "informed" nor "reasonable" to fail to conduct minimal investigation into the relevant law applicable to your client's case - especially when you are appointed

because prior counsel was accused of cutting those same corners. See Strickland, 466 U.S. at 690-91; Jones, 183 Wn.2d at 340-41 (strategic decisions are those made with information before the action or inaction occurs, not those made without such information or in hindsight).

Mr. Jackson is not seeking to withdraw his pleas. But he was entitled to have a lawful sentence imposed. When Clark took over as counsel, he knew he was there because prior counsel was accused of having failed to properly evaluate the impact of the California crimes on Jackson's offender score.

Clark failed to provide effective assistance. Mr. Jackson was sentenced based on an improperly calculated offender score. This Court should so hold and should reverse and remand for resentencing with assistance of new counsel.

2. THE SENTENCING COURT ERRED IN FAILING TO CONSIDER ACTUAL ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS AND COUNSEL WAS AGAIN INEFFECTIVE

This Court should also reverse and remand for resentencing under Blazina and its progeny. The sentencing court failed to follow the requirements of RCW 10.01.160 and Blazina and subsequent cases control.

a. Relevant facts

At the original sentencing in 2014, the judge verbally ordered a $200 filing fee, $500 crime victim fee, $600 attorney fee recovery, thousand dollar jail fee and a "hundred dollar DNA" fee, for a total amount of $2,446 in legal financial obligations. 5RP 27. On July 24,

2014, the prosecutor asked to clarify several things before "formal entry of sentencing," including the "payment schedule." 6RP 1-2. Preprinted on the Judgment and Sentence was a clause providing that the court "has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160)." CP 190. Also preprinted was a clause providing that "other legal financial obligations" could be added later, that DOC should "immediately" start deducting any monies from any "payroll" Jackson might make. CP 194.

The prosecutor asked about the schedule and the court set it at $25 per month, with the payments to start "60 days from today's date" because Jackson was going to DOC. 6RP 2-3. The judge then told Mr. Jackson that he could not vote "unless or until you receive a certificate of discharge from the office of the county clerk which tells you that you have satisfied all the financial aspects of the Judgment and Sentence." 6RP 4-5.

About a month after sentencing, appointed counsel Blair submitted request for attorney fees at a rate of $75.00 per hour for 21.45 hours of work, for a total of $1,608.75. CP 53. Judge Brosey entered an order amending the judgment and sentence, adding "court appointed attorneys fees and costs to be paid by the defendant in the sum of $1608.75" as an amendment to the judgment and sentence. CP 55-56.

In July of 2015, at the same time that he moved pro se for resentencing, Mr. Jackson also filed a pro se Motion to Terminate All Legal Financial Obligations below. CP 127-30. He argued that the

sentencing court had made an improper "[b]oilerplate decision" on his ability to pay and had failed to make the required findings under Blazina. CP 127-30. He submitted evidence that the current "LFO Balance" for the case was up to $4,380.04 from the original $2,446. CP 130.

Once the matter was set for November 20, 2015, Jackson filed a request for counsel to help him with his motions due to his indigent status. CP 141. After that, the prosecution filed a response, in which it admitted that the trial court "must inquire as to the defendant's present and future ability to pay legal financial obligations," but asked the court to deny relief without further argument. CP 146-47, 150.

At the hearing on the motions, the prosecutor called former counsel Blair to testify against Jackson. At one point, the court inquired of Blair about what Jackson had said about himself, establishing that Jackson had only relocated to Washington a very short time before the alleged crimes. 7RP 76-77. Counsel was not sure but said he thought Mr. Jackson was working but could not recall what that work was or where in might be. 7RP 77.

The prosecutor then asked if there was anything about Jackson - about which former counsel was aware - which would "prevent him [Jackson] from getting a job or working when he is released from the department of corrections," and counsel Blair then recalled that Jackson had said he was working in California but had to go through a bad neighborhood to do so and that was one reason he had moved to Washington. 7RP 78. Counsel still could not recall what the work involved. 7RP 78.

The judge tried to establish whether Jackson had said he was "a tattoo artist," but Blair just could not answer the question and could only speculate, "maybe." 7RP 79.

Mr. Jackson testified about the legal financial obligations and was wondering about the difference between the current amount of about $4,300 and the judgment and sentence amount of $2,500 when there was no restitution. 7RP 84. The court explained the subsequent order for attorney fees of $1,608.75 had later been entered. 7RP 86.

Jackson was found indigent for the case and said that, while he can work, he suffers from bipolar disorder. 7RP 86. As a result, Jackson had trouble keeping a job more than about three weeks. 7RP 86. Jackson was on "state assistance" at the time of the crime. 7RP 87-88. His plan was "to try to find a job" but now that he was in custody, he could not work. 7RP 87-88. He said he hoped that, once he got out, he could get a job in construction or tattoo work. 7RP 88.

The court reimposed the $500 crime victim fee as "mandatory," $246 in court costs for the service and filing fees and the DNA fee as "mandatory." 7RP 90-91; CP 316. The court said it appeared Jackson could work and "has the ability to earn money and make periodic payments on his LFOs." 7RP 90. The judge struck a $600 attorney fee as duplicative and eliminated the $1,000 "jail fee." 7RP 90. The judge set the payment at $25 a month because otherwise the judge thought DOC will make him pay for costs of incarceration and the judge preferred "that if he makes any money at all that's available it goes to his LFOs." 7RP 91-92. The judge then explained he had imposed the ongoing $25 a month

payment towards that amounts due from Jackson because the court thought that would mean Jackson "is not facing the horrendous burden" when he is finally released from custody. 7RP 91-92. The judge wished he could do something about the mandatory imposition of 12 percent interest, but did not think he could. 7RP 91.

The court entered written conclusions which included the following finding:

> The defendant has the present and future ability to work and pay toward his legal financial obligations but the judgment and sentence shall be amended to reflect the $600 attorney fee shall be struck and the $1,000 jail fee shall be waived.

CP 317. An order so amending the judgment and sentence was also entered. CP 318. Shortly thereafter, the lower court found Mr. Jackson was indigent for the purposes of appeal.

b. The court erred below

This Court should reverse the orders imposing the legal financial obligations under Blazina and its progeny. In Blazina, our state's highest court looked at RCW 10.01.160(3), the statute authorizing imposition of legal financial obligations. 182 Wn.2d at 835. That statute provides that the court "shall not order the defendant to pay costs unless the defendant is or will be able to pay them," and further that the court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" before ordering a defendant to pay legal financial obligations (LFOs). Blazina, 182 Wn.2d at 836. The Court held that the statutory mandate prohibited a sentencing court from imposing an an order of such costs without first making a detailed examination of

whether the defendant has the actual or likely ability pay. 182 Wn.2d at 835.

Further, making a finding of "ability to pay" requires more than just being able-bodied and thus not generally precluded from getting a job - as the lower court did here. Blazina, 182 Wn.2d at 835; see 7RP 78. Instead, the sentencing court must make a finding of actual ability to pay based on a detailed look at such things as the length of incarceration, existing financial obligations and whether the defendant qualified for a public defender and thus was indigent. Id.

Further, the Blazina Court rejected the very same kind of pre-printed "boilerplate" finding of "ability to pay" used in this case. 182 Wn.2d at 836. Such findings do not meet the requirements, the Court held, because, "[p]ractically speaking, this imperative under RCW 10.01.160(3) means a court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. In addition to looking at existing financial debt and other factors, the Blazina Court also noted that if someone met the requirements of proving they were indigent, "courts should seriously question that person's ability to pay[.]" Id.

The Court has recently reaffirmed Blazina and further held that the issue is not waived when not objected to below *and* that the reasoning of Blazina applies to not only discretionary LFOs but those mandated by statute. See State v. Duncan, 185 Wn. 2d 430, __ P.3d __ (No. 90188-1) (April 28, 2016). See State v. Leonard, 184 Wn.2d 505, 358 P.3d 1167 (extending Blazina to apply to RCW 9.94A.760(2) and costs of

incarceration). (2015).

Even more recently, our state's highest court struck down an order requiring an indigent defendant to pay $15 per month towards outstanding legal obligations in City of Richland v. Wakefield, __ Wn.2d __, __ P.3d __ (September 22, 2016) (No. 92594-1). In that case, the defendant had several convictions and challenged discretionary costs in a collateral attack, rather than direct appeal. Over the years, she had made intermittent payments and ultimately faced proceedings against her in a "fine review hearing," where she asked the trial court to "remit" her fines. The trial court first declared that "the caselaw doesn't say just because she's indigent or just because she has trouble meeting basic needs that she's excused from the penalty." Slip op. at 5. The judge then ordered, *inter alia*, a payment of $15 per month towards outstanding LFOs. Slip Op. at 1. The defendant had income of about $710 a month from public assistance.

On review, the Court noted the trial court's duty is to determine whether payment of the amount due will impose "manifest hardship" on the defendant or their immediate family. The lower court had failed in that duty by failing to recognize or apply the manifest hardship standard, because it had simply imposed costs without examining whether paying them would cause such hardship on Wakefield and her family. Id.

The Court then held that it was "legal error" when the district court had disregarded the question of whether Wakefield could currently meet her own basic needs when evaluating ability to pay. It further reaffirmed Blazina and again instructed lower courts: "courts can and should use GR

34 as a guide for determining whether someone has an ability to pay costs."

Most significant to this case, the Court took the opportunity to repeat its very serious concerns about "the particularly punitive consequences of LFOs for indigent individuals" that it had discussed in Blazina. And it cautioned against setting low payment amounts as a panacea, again noting that, under our system, a person who pays $25 a month without fail every single month will *still* owe more towards the average LFOs 10 years later than the day the sentencing court imposed them. Slip Op. at 11. The Court found it "unjustly punitive to impose payments that will only cause their LFO amount to increase," holding that such low payments should not be ordered except for "short-term situations." Slip Op. at 12.

Just like the defendants in Blazina, appellant is indigent. He qualified for a public defender at trial and in this appeal. He was given appointed counsel due to his lack of resources. There was no evidence presented at trial that he had any money or ability to pay costs. And the sentencing court did not, in fact, make the required findings, instead just entering the judgment and sentence with an improper "boilerplate" pre-printed "finding" of "ability to pay" condemned in Blazina. Further, setting the payment at $25 per month with 12% interest runs afoul of the cautions of Wakefield and increases the debt in the long term. Reversal and remand for resentencing is required.

3. INTERPRETING SINCLAIR TO REQUIRE IMPOVERISHED APPELLANTS TO REBUT AN APPARENT PRESUMPTION OF IMPOSITION OF COSTS ON APPEAL FUNS AFOUL OF NOLAN AND IS UNCONSTITUTIONAL UNDER FULLER AND BLANK

In Sinclair, supra, a defendant/appellant unsuccessfully appealed his criminal conviction and, after the decision on the merits so holding, the prosecution filed a request for costs. Sinclair, 192 Wn. App. at 385. The defendant objected. Id. On reconsideration, the prosecution urged Division One to impose costs on appeal against an unsuccessful appellant in *every* criminal case, claiming that the statutory opportunity for a defendant to later bring a request to remit costs was sufficient to ensure that appellate costs were proper. 192 Wn. App. at 388-89. While Division One disagreed, it also disagreed with this Court that Blazina applied to the question of imposition of costs on appeal, instead finding that the issue involves more than just a question of "ability to pay" but also whether discretion should be exercised to order costs on appeal in the first place. Sinclair, 192 Wn. App. at 388-89.

The Sinclair Court also disagreed with this Court's remedy of ordering costs on appeal in such situations conditioned upon a finding of remand by the trial court that the indigent defendant had "ability to pay" as defined in Blazina. Sinclair, 192 Wn. App. at 388-89. For Division One, entering such a conditional order amounted to delegation of the appellate court's duties. Id.

The Sinclair Court then crafted two new pleading requirements; 1) an appellant must set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs in case there is a future request for

costs by the respondent and 2) the prosecution must make arguments regarding this issue in its "brief of respondent" in order to "preserve the opportunity to submit a cost bill" should it later decide one is warranted. 192 Wn. App. at. 390-91.

The Sinclair Court also ruled on the merits of the request in that particular case. 192 Wn.2d at 391-92. Division One recognized a presumption of indigence which applies throughout the appeal under RAP 15.2(f), unless it is rebutted by the state. Sinclair, 192 Wn. App. at 391-92. That Court then rejected the idea that imposition of costs on appeal was proper because of the defendant's prior solid work history and the lack of evidence that he might be "unable" to work in the future. Id. Instead, the Court pointed out that Mr. Sinclair had been found indigent both at trial and on appeal and there was "no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent)." Id. Because there was no trial court order that Sinclair's financial situation had improved or was likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s if he did not die in prison, the Court exercised its discretion to deny the state's request for appellate costs. Id.

This Court has not yet indicated if it will follow the decision in Sinclair and change its existing procedures. But Sinclair should not - and cannot - be interpreted to create a presumption that costs on appeal will be imposed against an indigent appellant unless they meet a requirement of proving otherwise, because of the fundamental constitutional rights

involved.

At the outset, this very question has been decided by our highest Court. In Nolan, supra, the prosecution argued that costs should be awarded virtually as an "automatic" process in every criminal case, even if the defendant is indigent and the appeal not wholly frivolous. Nolan, 141 Wn.2d at 625-26. The Court rejected those claims. Even it a party establishes that they were the "substantially prevailing party" on review, the Court held, the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide in an exercise of its discretion whether to impose costs even when the party seeking costs is technically entitled to them. Nolan, 141 Wn.2d at 628.

There is a second problem with interpreting Sinclair to provide that an appellant's failure to preemptively object to imposition of costs on appeal will result in automatic imposition of such costs. In order to fully understand this issue, it is important to look at the rights involved. There is no federal constitutional right to appeal a criminal conviction. See McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Our state constitution, however, guarantees such a right. Blank, 131 Wn.2d at 244-46.

As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

The state constitutional right to appeal is not, however, the only

right involved. Where, as here, a state creates a right, federal due process and equal protection mandates apply and preclude the state from burdening the right in particular ways. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). As a result, when there is a state-created constitutional right to appeal, that appeal must be more than a "meaningless ritual" and must comport with basic notions of fairness. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The due process clause of the Fourteenth Amendment guarantees a criminal appellant who is pursuing her first appeal of "right" in a state court certain minimum safeguards to make the appeal "adequate and effective," including the right to counsel. Id. Further, even though no federal right to *appeal* is involved, federal due process and equal protection mandates apply to the procedures used in deciding a first appeal as right. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Thus, state constitutional rulings are not the only arbiter of the constitutionality of a state practice in an appeal brought as a matter of state constitutional right.

This intertwining of federal and state constitutional principles is at issue here, where an impoverished person chooses to exercise a state constitutional right and is required to pay to do so. In general, it is unconstitutional to require payment for the exercise of a constitutional right. See Fuller, supra. In Fuller, however, the U.S. Supreme Court upheld a statute requiring an indigent defendant who received appointed counsel on appeal due to poverty to later repay that cost if he had become

able. 417 U.S. at 45.

In reaching its conclusion, the Fuller Court relied on several crucial features of the statute in question. First, the statute did not make repayment mandatory. 417 U.S. at 45. Second, it required the appellate court to "take into account the defendant's financial resources and the burden that payment would impose." See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). Third, the statute provided that no payment obligation could be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. Fourth, under the statute, no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

Based upon these careful proscriptions on how the repayment obligation was imposed and enforced, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply "provided that a convicted person who later becomes able to pay . . .may be required to do so." 417 U.S. at 53-54. Because the legislation was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship," the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and upheld our state's own "recoupment" statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

> (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

(3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Blank, 131 Wn.2d at 245; quoting, RCW 10.73.160.

In upholding the constitutionality of the statute, the Blank Court was convinced that the remission procedure in subsection (4) of the statute would operate to ensure that the statute was consistent with the mandates of Fuller. Blank, 131 Wn.2d at 246. Indeed, the Blank Court was confident that trial courts would be following the analysis and requirements of Fuller in deciding issues regarding enforcement and collection of costs on appeal. Blank, 131 Wn.2d at 246.

Blank was decided in 1997. But last year, in Blazina, the Supreme Court issued its decision which cast serious doubt on the continuing validity of Blank - and whether the recoupment statute can still be deemed

"constitutional." By statute, an award of costs on appeal becomes part of the judgment and sentence, so that it may be collected against by the state just as trial LFOs. RCW 10.73.160(3). The same 12 percent interest that the Supreme Court found untenable in Blazina, the same ever-deepening hole of collection, the same problems of enforcement against an indigent, the same difficulty of the defendant to get a job with a criminal history once released let alone sufficient money to pay off the costs of appeal while in custody - in short, all but the concerns about the racial disparity in imposition of costs are clearly present in both situations.

In addition, there is a very significant difference between costs on appeal and trial costs not discussed in Sinclair. Costs imposed at trial are part of the sentence, intended to serve those punitive purposes, but the ostensible purpose of appellate "recoupment" statutes such as RCW 10.73.160(3) is "not punishment but simply a fiscal interest in recovering money expended and in discouraging fraudulent assertions of indigency." Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J. OF L. REFORM 323, 339 (2009).

We now know, because of Blazina, that the protections the Court relied on in Blank do not exist and people are, in fact, spending time in jail for nonpayment of legal financial obligations they are unable to pay because of poverty. Because appellate costs are included as part of those LFOs because they are added to the judgment and sentence, the impacts noted in Blazina will fall equally on appellants. Under Fuller, no payment obligation can be imposed "if there was no likelihood the defendant's

indigency would end." Fuller, 417 U.S. at 46. Further, under Fuller, this Court cannot impose costs on appeal unless it considered the appellant's actual ability to pay, not simply based on a presumption that costs *will* be imposed unless the defendant provides sufficient evidence that they should not or meets some briefing requirement on that point. This Court should decline to follow Sinclair and should further decline to impose costs on appeal in this case.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for resentencing with new appointed counsel and should decline to impose costs on appeal.

DATED this 9th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel via first-class postage prepaid, to Sarah.Beigh@lewiscountywa.gov, and to Mr. Byron F. Jackson, DOC 376049, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 9th day of November, 2016

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